

# **MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL**

**PARLIAMENT HOUSE, MONDAY 1 MARCH 2010**

**Present:** Lord Justice General (Hamilton)  
Lord Justice Clerk (Gill)  
Sheriff Fiona Reith QC  
Sheriff Frank Crowe  
Frances McMenamin QC  
Jamie Gilchrist QC  
James Keegan QC  
Iain Fleming, Solicitor  
Morag McLaughlin, Procurator Fiscal Service  
Gillian Prentice, Deputy Principal Clerk of Justiciary  
David Shand, Sheriffdom Business Manager  
Professor Fiona Raitt, University of Dundee  
David Kemp, Sheriffdom Legal Adviser

**In attendance:** Michael Anderson, Legal Secretary to the Lord President  
Rachael Weir, Scottish Government

**Apologies:** Lord Matthews  
Sheriff Nigel Morrison QC  
James Chalmers, Edinburgh University  
John Logue, Crown Office  
Graeme Marwick, Principal Clerk of Session and Justiciary  
Don McGillivray, Scottish Government

## **Item 1: welcome, apologies and introductions**

1. The Lord Justice General welcomed members and noted apologies. He introduced Rachael Weir, who was representing the Scottish Government in the absence of Don McGillivray.

## **Item 2: minutes and matters arising**

2. The minutes of the meeting of 29 June were approved. No matters arose which were not otherwise dealt with on the agenda.

## **Item 3: updated on Acts of Adjournal**

3. The Council noted that since the last meeting two Acts of Adjournal had been made. The first of these was the Act of Adjournal (Criminal Procedure Rules Amendment No 4) (Devolution Issues) 2009 (SSI 2009/322). The

second was the Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2009 (SSI 2009/345). The Council had no observations to make on either of these instruments.

#### **Item 4: draft Act of Adjournal**

4. The Council considered a draft Act of Adjournal prepared by the Lord President's Private Office. This did five things. It gave effect to the decision made at the meeting of the Council on 29 June 2009 to make provision to the effect that the minimum number of jurors from which a jury could be balloted should be 30 and to amend rule 13.1 to provide for the minimum number of jurors on a list of jurors to be increased from 30 to 40. It also made provision on the lodging and intimation of transcripts so as to ensure that where a transcript was obtained, the relevant party proceeded to lodge it. This was in line with a previous submission from the Crown Office. Thirdly, it made provision amending rule 19A.1 to extend the circumstances in which the Clerk of Justiciary could alter the place where a diet is to call. This was in line with a submission from the Deputy Principal Clerk of Justiciary. Fourthly, it proposed amendments to rule 27A.1, again in response to a previous Crown Office submission, to make clear that an appeal against a decision on recovery of documents in the sheriff court required to be served on the third party haver. Finally, the draft Act of Adjournal included provision, previously agreed by the Council, in relation to applications for recovery orders in respect of knife licensing.

5. The Council had observations only on the first two of these provisions. As regards the provisions on jurors, the Council was of the view that the Act of Adjournal should also include provision setting out the powers of the court in the event that it was not possible to proceed to ballot a jury as a result of an insufficiency in the number of jurors present in court. As regards the provisions on transcripts, the Council was of the view that it was unnecessary to go further than the draft by way of providing for a sanction in the event of failure to lodge a transcript in compliance with the new rule. Otherwise, the

Council supported the draft and recommended that the Court should make the Act of Adjournal.

### **Item 5: Scottish Government update**

6. The Council was updated on the position regarding the Criminal Justice and Licensing (Scotland) Bill. The general principles of the Bill had been approved at the Stage 1 debate on 26 November. Stage 2 commenced on 2 March. Stage 3 was likely to be in May. It was anticipated that commencement of the provisions in the Bill would be staged.

7. The most significant change to the Bill was that the provisions on the Scottish Sentencing Council were to be the subject of Government amendments to convert the proposed body into one having the function of proposing draft sentencing guidelines which would require the approval of the High Court before coming into effect. Other amendments on the cards included: altering the definition of “public place” in knife possession legislation so as to take account of common closes; human trafficking; credit card skimming; and the implementation of three European Framework Decisions (on previous convictions, enforcement of warrants and probation decisions).

### **Item 6: section 300A and lodging of appeals**

8. The Council considered a previous Crown Office submission regarding the application of section 300A of the 1995 Act to the late lodging of an appeal under section 74 (appeals in connection with preliminary diets) or section 174 (appeals relating to preliminary pleas). It was unclear to which court such an application should be made. Following discussion, the Council considered that attempting to clarify this point directly was hazardous as there was some doubt as to whether section 300A in fact applied at all in such a situation (the argument being that there was no procedural irregularity where someone failed to lodge an appeal). The Council favoured the creation of some mechanism whereby an appeal could be lodged out of time. Its preference in

the circumstances was for sections 74 and 174 to be amended directly to allow for this. The Council noted that it would be possible for the Court to do this by way of the power conferred by section 305(2) of the 1995 Act. It was however drawn to their attention that the Scottish Government intended to bring forward amendments at Stage 2 of the Criminal Justice and Licensing (Scotland) Bill to extend the current two day periods for lodging such appeals to seven days. In itself, this would go significantly towards resolving the difficulty. In so far as a difficulty might remain, the Council invited the Scottish Government to consider whether it might be sensible, at the same time as amending the time limits, to amend the sections so as to enable appeals to be lodged late.

#### **Item 7: written submissions in appeals against conviction**

9. The outstanding issues in relation to progressing this draft Act of Adjournment were the legal aid position and the position of the Crown. The Council had before it letters from the Scottish Legal Aid Board and the Crown Office.

10. The Crown was of the view that the process of written submissions would work most effectively, and reduce the burden on the Crown to prepare successive submissions, if the normal principle that the appellant set out the basis for the appeal and the Crown responded was followed as closely as possible. The Council agreed. The Crown also suggested that it was not necessary for the process of written submissions to be mandatory in relation to appeals against summary conviction. The Council took the view that the new process should apply across the board.

11. The Scottish Legal Aid Board indicated that it expected soon to make amendments of the Regulations which would facilitate the making of the Act of Adjournment. The Council was of the view that this was a necessary precursor to further progress with this work.

12. A member raised the structure of the procedure in that it did not make a Crown submission mandatory. Given that the passing of the sift by the case meant that the Court had reached the view that there was an arguable ground of appeal, it was felt that the Crown should be required to prepare a written submission on it. It was however felt by the judicial members of the Council that this did not follow; the issue might well be sufficiently clear cut that there was no need to put the Crown to the trouble of preparing a submission.

13. Finally, the Council considered observations on the workability of the proposals made in a paper provided by the Deputy Principal Clerk of Justiciary. It was felt that the sensible course was for these matters to be referred to Lord Carloway (as the administrative judge with responsibility for criminal appellate work) with a view to a final draft of the instrument being presented at the next meeting of the Council.

#### **Item 8: RIPA working group**

14. The Council considered a paper from the RIPA working group. This reached the conclusion that in view of the legislative framework there could be no role for a special counsel in applications under section 18 of the 2000 Act. Accordingly, there would be no contradictor in any application. The paper also reached the conclusion that there should not be a rule in relation to such applications; instead the working group invited the Council to consider a draft of a suggested protocol between the Scottish Court Service and the Crown. The conclusions of the working group on both of these points were not unanimous.

15. Concern was expressed that it was the function of the Rules Council to consider proposals for rules rather than to give its imprimatur to any document of a lower status such as the proposed protocol. In view of this, and also in view of the disagreement amongst the members of the working group as to the way to take this matter forward, the Lord Justice General indicated that it was for him to consider the matter and to propose rules as appropriate.

### **Item 9: proposed amendment of section 75A of the 1995 Act**

16. The Council considered a paper from the Deputy Principal Clerk of Justiciary which proposed that section 75A of the 1995 Act be amended in order that the Court could change any diet fixed in proceedings on indictment without the need for an initiating application by one of the parties. It was stressed that it was envisaged that where the Court was contemplating taking this step, it would afford the parties the opportunity to make submissions at a hearing. This would be much along the lines as happens currently where the application for a change is made by one but not both of the parties.

17. The Council agreed that this proposals should be pursued by way of an Act of Adjournal amending the 1995 Act. Points were raised as to whether a similar innovation would be useful in relation to summary proceedings (sections 137 and 137ZA being the relevant provisions). It was agreed that the Deputy Principal Clerk would discuss this issue further with Mr Shand and Mr Kemp and report back to the Private Office accordingly.

### **Item 10: Protection of Vulnerable Groups (Sc) Act 2007**

18. The Council considered a paper from the Scottish Government on the potential implications of this Act for the Rules. The Council agreed with the conclusions of the paper, namely that a new rule would be required in respect of section 7 of the Act to replace Chapter 47 of the Rules which made provision for section 10 of the Protection of Children (Sc) Act 2003. There would be a need for appropriate savings and transitional provisions in respect of referrals under the 2003 Act. It was anticipated that the relevant provisions of the 2007 Act would be commenced some time later in 2010.

### **Item 11 – media reporting restrictions procedure under the Contempt of Court Act 1981**

19. The Council considered a paper from the Scottish Government proposing the making of rules, or a practice note, in relation to the procedure

for the making by the courts of orders imposing media reporting restrictions under the Contempt of Court Act 1981. The desirability of so doing arose as a result of the case of *Mackay and the BBC v the United Kingdom*, which was currently before the European Court of Human Rights. The Council was of the view that in principle it made sense to take further steps in relation to this matter. It was of the view that a practice note was the best way to do so. It was understood that the Scottish Government would make subsequent contact with the Private Office regarding this matter and in particular the detail of what the practice note might usefully do.

**Item 12: any other business**

20. There was no other business.

21. The next meeting was set for Monday 12 July 2010 at 10.30 am.

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